

On December 21, 1999, claimant was working as a construction foreman or superintendent for respondent remodeling a restaurant in Manhattan, Kansas. Claimant testified that on that date he was carrying sheetrock when his knee gave out and he fell to his knees. He was carrying the sheetrock alone and there were no witnesses to his alleged accident.

Claimant said there was another superintendent, Craig Williams, at the work site, but claimant did not initially report this injury as a work related accident because he thought it would go away. Claimant says he did mention it to his helper, Dave Otterson. Claimant said that later, on Thursday, December 23, he told the general manager, Brian Marshall, about his accident and knee injury. Claimant did not request medical treatment at that time. Claimant described his knee as swollen and painful beginning December 21 and thereafter it continued to get worse. Claimant does not allege that he gave notice of accident to anyone in a supervisory capacity other than Brian Marshall. He continued working until December 28 or 29, 1999.

After claimant quit his employment with respondent he sought medical treatment on his own with a Dr. Conant in Dodge City, Kansas. The January 6, 2000 office chart entry made by the Physician's Assistant for Dr. Conant contains this history:

"Supervisor for JAG Construction. Notes over the past 2-3 days has had pain at the medial left knee joint. Feels that the pain is due to carrying boxes up and down stairs on construction project in Manhattan. Denies any earlier injury to this knee."

In February 2000 claimant moved to St. Paul, Nebraska, where he saw Dr. Michael L. McCarty. The February 29, 2000 initial entry by Dr. McCarty gives the following history:

"He presents with a 2-3 month history of left knee pain. He injured this on 12-21-99 when he was carrying sheetrock up some stairs and twisted his left knee. Had some pain and popping to the medial aspect of the left knee. He has been having some recurrent swelling, popping, catching, and clicking. He has been treated with rest and time over the last several months by a physician in Kansas. He still walks with significant antalgic gait."

Surgery was performed on March 7, 2000 for a medial meniscal tear. The nurse's notes from that surgery describe claimant having a strong smell of alcohol, slurred speech and eyelids at half-mast. It further described claimant as having difficulty following directions. In the transcript of the August 2, 2000 preliminary hearing the ALJ mentions that he noticed an odor of alcohol when claimant was testifying.

Although claimant admits to being an alcoholic he denies consuming any alcohol while in Manhattan, Kansas, until the night before he quit his employment.

Mr. Brian Marshall denied that claimant reported a work related accident or injury on December 23, 1999. Furthermore, Mr. Marshall said he was at the Manhattan job site on December 20, 21, 28 and 29, and has no recollection of claimant ever showing any appearance of having a knee injury. Mr. Marshall testified that on the morning of December 28 he arrived at the job site between 7:00 and 7:30 a.m. About 8:00 a.m. Dave

Otterson arrived and Mr. Marshall asked Mr. Otterson where claimant was. According to Mr. Marshall, Mr. Otterson

"... said he guessed he [claimant] was still in his motel room. And he went on to say that they had went out on the town drinking since it was probably going to be their last night in Aggieville and had really tied one on, and he guessed that Doug was sick this morning."

After claimant showed up, his work performance was extremely poor. Mr. Marshall said:

"I asked Doug [claimant] if he had a hard night last night, and he said yeah, that he was not used to that drinking and he was feeling terrible today, and I told him that it showed and told him that we had to get the punch list done before we left that evening. And they wanted to leave at noon, and I think I ended up discharging them and sending them back to Dodge about three o'clock that afternoon."

At no time did Mr. Marshall notice claimant having any knee problems and claimant did not mention hurting his knee. But Mr. Marshall said that later that day he had a conversation with Dave Otterson and Mr. Otterson

"... reiterated that they had been out drinking and said that Doug was all hung over and claims that his knee hurts. And then he went on to say, but I can tell you why his knee is hurt, because he fell down out here on the sidewalk. Dave went on to say that he was extremely drunk and got real wasted as he put it."

Mr. Marshall further testified that he could smell alcohol on claimant's breath that morning. Mr. Marshall wrote up a disciplinary report but was never able to confront claimant with the report because claimant quit his job and did not show back up. The last time Mr. Marshall talked to claimant was the afternoon of December 28, 1999. Claimant never mentioned having suffered any work related injury.

Mr. Craig Williams testified that he is a self employed construction contractor. From time to time he works as a subcontractor for respondent. Mr. Williams testified that he was no longer at the Manhattan, Kansas, job site after December 17, 1999. This conflicts with claimant's testimony that Mr. Williams was also a superintendent and was working with him at that job site on the accident date. Mr. Williams, however, was not questioned about any personal knowledge he may have concerning claimant's accident or injury. Instead, his testimony focused on a conversation he had with Dave Otterson. Sometime after Christmas of 1999, Mr. Williams ran into Mr. Otterson at a job site in Dodge City, Kansas. According to Mr. Williams, Mr. Otterson told him that "Doug [claimant] started drinking again, and that he had fell on the curb and hurt himself." Mr. Williams did not recall

whether Mr. Otterson stated that it was the knee that claimant injured. Furthermore, Mr. Williams did not say when this accident was supposed to have occurred.

Mr. Otterson testified that he was working for respondent in December of 1999 at the Manhattan, Kansas job site. Claimant was his supervisor. Although he does not recall the date, Mr. Otterson testified that he recalls claimant telling him about injuring his knee at the Manhattan job site while carrying sheetrock down stairs. Mr. Otterson denies ever telling Mr. Marshall that claimant had injured himself away from work when he fell down after he had become intoxicated in Aggieville. Mr. Otterson also denies having a similar conversation with Craig Williams. According to Mr. Otterson, the only conversation he had with Mr. Williams was when they talked about claimant falling and hurting his knee on the job while carrying sheetrock.

Mr. Otterson did not witness the accident at work but said claimant told him about it 15 to 30 minutes afterwards. After that claimant walked with a noticeable limp. Mr. Otterson admits to being friends with claimant and socializing with him away from work. Mr. Otterson also admits that he and claimant went drinking in Aggieville the night before their last day on the Manhattan job. He thinks this was probably the night of December 27, 1999. He denies, however, that claimant became intoxicated. He said they "had a couple of cocktails." That was the only time he recalls claimant going drinking with him while in Manhattan. He said they both showed up for work on time the next morning.

Finally, Mr. Eric Thompson, business manager and safety director for respondent, testified. He said that claimant never notified him of a work related injury during the month of December, 1999. The first notice he received of an alleged work related injury was a May 2, 2000, letter from claimant's attorney which he received on May 5, 2000. Mr. Thompson used respondent's business records, including time sheets, to verify that December 20, 21, 27 and 28, 1999, were the dates that claimant was at the Manhattan job site. Claimant was a job foreman. Dave Otterson was on claimant's crew as a laborer. Brian Marshall, respondent's general manager, was on the job site from time to time and Craig Williams, a subcontractor, was on the job. After receiving the workers compensation claim letter, Mr. Thompson spoke with Brian Marshall and Craig Williams. Neither had any knowledge of a work related injury, but Mr. Marshall related that he had been told claimant had fallen down while inebriated the night before the job ended. Craig Williams, who is not an employee of respondent, told him the same thing as Brian Marshall.

The issues raised in this appeal turn on the credibility of the witnesses. Based upon the record as a whole, the Appeals Board finds that claimant has not met his burden of proving that his knee injury arose out of and in the course of his employment from an accident on December 21, 1999. Furthermore, the record does not establish that it is more probable than not that claimant gave respondent timely notice of a work related injury.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on September 14, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS  
James M. McVay, Great Bend, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director